Supreme Court, U. S.
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RODAK, JR., CLER

In the Supreme Court of the United States

OCTOBER TERM, 1978

NO. 79-167

ALBERTO EFRAIN HERNANDEZ-FERNANDEZ,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The Petitioner as named above respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on June 1, 1979. Petition for Rehearing was timely filed and was denied by the Fifth Circuit on June 28, 1979. A certified copy of the judgment of the Fifth Circuit issued as and for the mandate as to the above named Petitioner was filed on July 16, 1979.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in Appendix I hereto.

JURISDICTION

This Petition is brought under Rule 19 1.(b), Rules of the Supreme Court of the United States, and 28 U.S.C. 1254 (1),

investing this Court with jurisdiction.

QUESTIONS PRESENTED

1. Whether the trial court erred in denying Defendant's Motions for Mistrial where the conduct complained of was prejudicial to the substantial rights of the Defendant and was of such a nature as to vitiate the final result, thereby requiring a new trial.

2. Whether the trial court erred in permitting the admission of irrelevant and immaterial evidence, having prejudicial impact.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States:

Amendment V.

". . . nor be deprived of life, liberty or property without due process of law . . . "

STATUTES AND FEDERAL RULES INVOLVED

The provisions of Title 21, USC § 841(a)(1), and Title 18, USC, § 924(c)(2).

STATEMENT OF THE CASE

Your Petitioner herein was indicted along with several other individuals in January, 1978, in the United States District Court, Southern District of Florida, Case No. 78-35-Cr-JE, and charged with conspiracy to possess with intent to distribute said controlled substance and unlawful carrying of a firearm during the commission of a felony (Title 21, USC § 841(a)(1); Title 18 USC § 2; Title 18 USC § 924(c)(2)). The alleged offenses came to trial on July 18, 1978, as to your Petitioner only, inasmuch as the co-defendants had entered into plea bargain agreements.

Prior to opening argument, the trial court inquired of the Government as to what "oral statements" made by co-defendants it intended to introduce into evidence. On the basis that "you do not establish a conspiracy itself by somebody else's statements" a standing hearsay objection was made by defense counsel and duly noted by the Court. Said objection was denied.

Motions for mistrial were twice made, the first occurring during the testimony of alleged co-conspirator Arthur Alamo. When asked by the Government if he had occasion to come in contact with the defendant on January 13, 1978, Alamo responded in the affirmative, further indicating that on said date the defendant delivered cocaine to one Karl Zurcher. The second motion was made during cross-examination of Alamo when he was asked if he actually knew the defendant. His response was that "I had seen him and people had pointed him out to me as being a cocaine source." Motions for mistrial were twice denied.

On July 20, 1978, the jury returned a verdict of guilty on Counts I, II and IV. A written motion for new trial was made on behalf of your Petitioner, but summarily denied by the Court. Your petitioner was subsequently sentenced to four years, with a special parole term of three years, as to Count I; four years with a special parole term of three years as to Count II and one year as to Count IV. Although Counts I and II are to run concurrent, the period of confinement specified as to Count IV is to run consecutively.

A Notice of Appeal was thereafter timely filed, and an appeal bond was posted to assure that your petitioner would be forthcoming to abide the sentence of the trial court, or the opinion and mandate of the Fifth Circuit Court of Appeals.

REASONS FOR GRANTING THE WRIT

Whether the trial court erred in denying Defendant's Motions for Mistrial where the conduct complained of was prejudicial to the substantial rights of the defendant and was of such a nature as to vitiate the final result, thereby requiring a new trial.

A mistrial is properly demanded and should be granted when error compounded upon error is so prejudicial to a defendant's substantial rights, including his right to a fair and impartial trial, that cautionary instructions to the jury would not be sufficient. Although the question of whether to declare a mistrial is within the discretion of the trial court, such discretion is not without its bounds. A mistrial must be ordered under those circumstances where the testimony in error creates so strong an impression in the minds of the jurors that they are unable to disregard same in their consideration of the case. *Maestas v. United States,* 341 F.2d 493 (10 CA, 1965); *United States v. Beran* , 546 F.2d 1316, cert. den. 430 US 916, 97 S.Ct. 1330, 51 L.Ed.2d 545; *Marshal v. United States*, 360 US 310, 79 S.Ct. 1171, 3 L. Ed.2d 1250.

When Government witness Alamo was questioned as to whether or not he actually knew the defendant, his response was that "I had seen him and people had pointed him out to me as being a cocaine source." This comment by Alamo compelled that the trial Court declare a mistrial. This grievous error could in no way be cured by a jury instruction to "not consider that answer." On direct examination the Government asked Alamo if he had occasion to come into contact with the defendant on January 13, 1978. Alamo responded in the affirmative, further indicating that a cocaine deal was closed on that date. As argued by defense counsel, "That is within the confines of absolutely no testimony . . . of any other witness that brings this within any period of the conspiracy." The defendant's Motion for Mistrial should have been granted.

The trial court erred in permitting the admission of irrelevant and immaterial evidence, having prejudicial impact.

As previously stated, Government witness Alamo informed the trial court and the jury about a cocaine deal which he closed on January 13, 1978. Alamo confirmed the defendant's participation in and detailed the circumstances of the transaction. That alleged criminal transaction was not within the purview of the indictment upon which the defendant was being tried. Evidence of prior crimes or ciminal conduct is not admissable to show the propensity or proclivity of an accused to commit the crime charged. Whatever probative value the prior conduct of a defendant may add to the prosecution's case even on the issue of the defendant's intent to commit the conspiracy here claimed, is far outweighed by the unwarranted inferences the jury is permitted to draw. *United States v. Decicco,* 435 F.2d 478 (2 CA, 1970). This evidence should have been excluded and the trial court erred in not so doing.

CONCLUSION

Based upon the foregoing reasons and citations of authority, your Petitioner, ALBERTO EFRAIN HERNANDEZ–FERNANDEZ, respectfully asks that the Writ of Certiorari issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Petition for Writ of Certiorari have been served upon the United States Solicitor General, Department of Justice, Washington, D.C. 20530, and upon the United States Attorney for the Southern District of Florida, Suite 300, Ainsley Building, Miami, Florida, this 31st day of July, 1979.

HENRY GONZALEZ

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DO NOT PUBLISH

No. 78-5659

UNITED STATES OF AMERICA,
Plaintiff-Appellee

versus

ALBERTO EFRAIN HERNANDEZ-FERNANDEZ,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(JUNE 1, 1979)

Before BROWN, Chief Judge, CLARK and VANCE, Circuit Judges.

PER CURIAM: AFFIRMED. See Local 21.[1]

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1. See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.